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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

HAO XU,

Plaintiff,

v.

ALBERTO GONZALES, United States Attorney
 General, U.S. Department of Justice;
 MICHAEL CHERTOFF, Secretary of the
 Department of Homeland Security;
 EMILIO T. GONZALEZ, Director of United
 States Citizenship and Immigration Services,

Defendants.

No. C 07-3383 PVT

DEFENDANTS' CROSS-OPPOSITION TO
 PLAINTIFF'S MOTION FOR SUMMARY
 JUDGMENT

Plaintiff Hao Xu asks this Court to issue a writ of mandamus, compelling Defendants to make a determination on his application for adjustment of status. He also asks the Court to find that Defendants have violated the Administrative Procedure Act ("APA"), and to grant relief under the Declaratory Judgment Act. Plaintiff's claims must fail. Plaintiff's application remains pending because his name check is not yet complete. The facts are undisputed, and Defendants are entitled to judgment as a matter of law. Accordingly, Defendants respectfully ask this Court to grant their motion for summary judgment.

This Court has recognized that it has no jurisdiction to compel the FBI to complete the name check and the claims against Defendant Gonzales, should be dismissed. *See Chao v. Gonzales*, Defendants' Opposition to Plaintiff's Motion for Summary Judgment
 C07-3383 PVT

1 2007 WL 3022548, *3 (N.D.Cal. Oct. 15, 2007); *see also Konchitsky v. Chertoff*, 2007 WL
2 2070325 (N.D.Cal. Jul 13, 2007) at*6.

3 Again, a review of the six *TRAC* factors laid out in Defendants' motion for summary judgment
4 show that Defendants' have not unreasonably delayed actions pertaining to Plaintiff's adjustment
5 of status application. Further, Plaintiff also asks the Court to grant reasonable attorney's fees
6 pursuant to the Equal Access to Justice Act ("EAJA") 28 U.S.C. § 2412. If Plaintiff is granted
7 summary judgment, Defendants want to fully brief the issue of the availability of fees under the
8 EAJA.

9 For the foregoing reasons, the Government respectfully asks the Court to dismiss Defendants
10 Alberto Gonzales and Emilio T. Gonzalez, and grant the remaining Defendant's motion for
11 summary judgment as a matter of law.

12 Dated: October 30, 2007

Respectfully submitted,

13 SCOTT N. SCHOOLS
14 United States Attorney

15 /s/
16 ILA C. DEISS
17 Assistant United States Attorney
18 Attorney for Defendants
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